***United States Court of Appeals***

***for the Second Circuit***


# BRIEF FOR APPELLEE

Original

# 74-1065

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# United States Court of Appeals

For the Second Circuit
Docket No. 74-1065

UNITED STATES OF AMERICA,

*Plaintiff,*

— against —

GENERAL DOUGLAS MAC ARTHUR SR., VILLAGE, INC., STATE OF NEW YORK, COUNTY OF NASSAU, VILLAGE OF HEMPSTEAD, TOWN OF HEMPSTEAD, SCHOOL DISTRICT NO. 1, SADIE SCHWARTZ, D.C.R. HOLDING CORP., HENRIETTA RAND, MARTHA BARKUS and SHIRLEY HERSHKOWITZ,

*Defendants,*

D.C.R. HOLDING CORP., HENRIETTA RAND, MARTHA BARKUS and SHIRLEY HERSHKOWITZ, SADIE SCHWARTZ,

*Defendants-Appellants.*

No. 74-1065

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

## BRIEF ON BEHALF OF DEFENDANT-APPELLEE, COUNTY OF NASSAU



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*Defendants,*

D.C.R. HOLDING CORP., HENRIETTA RAND, MARTHA BARKUS and SHIRLEY HERSHKOWITZ, SADIE SCHWARTZ,

*Defendants-Appellants.*

## APPELLEES' BRIEF

### Counter-Statement of the Case

General Douglas MacArthur Senior Village, Inc., hereinafter referred to as "MacArthur", is a membership corporation which was chartered pursuant to the Laws of the State of New York, on January 25, 1965 to provide housing for elderly families and persons on a non-profit basis.

On or about April 28, 1966, the United States acting through the Secretary of Housing and Urban Development loaned the sum of $1,774,000.00 to MacArthur. The United States received a note in that sum secured by a first

mortgage which, together with a regulatory agreement, was recorded in the Office of the Clerk of the County of Nassau on May 9, 1966.

After completion of the senior village facility, MacArthur failed to pay the County real estate taxes for the years 1969 and 1970 and school district and village taxes for the 1968/69 and 1969/70 fiscal year which were assessed against it.

D.C.R. Holding Corp. purchased the Village tax lien from the Village of Hempstead for $20,288.11 and Sadie Schwartz acquired the County and School District liens for $25,305.19. The estate of David Rand owns the 1969/70 School District and Village liens and the 1970 County lien, totaling $79,198.47.

On August 4, 1971, a proceeding was commenced pursuant to Title 28 U.S.C. §1345 to foreclose the United States' first mortgage on the ground that MacArthur had violated those provisions of the note and mortgage requiring it to pay all local real estate taxes levied against the property as the same became due. The holders of unpaid real estate tax liens or tax sales certificates were joined in this proceeding as defendants, and the United States urged that its lien was superior to those of the purchasers of the tax liens.

The answers filed by the municipalities and tax lien purchasers disputed the United States' claim that its mortgage was entitled to priority over the local real estate tax liens. Sadie Schwartz and D.C.R. Holding Corp. cross-claimed against the municipalities for recovery of the sums they paid for tax sale certificates if the United States' mortgage were accorded priority.

The United States moved for summary judgment. The motion was granted by District Judge Jack B. Weinstein, who found, however, that the local real estate tax liens were superior to the government's mortgage.

The Court of Appeals unanimously reversed that determination of the District Court with respect to the priority to be given local real estate tax liens, holding that the application of the Federal Tax Lien Act of 1966 should be limited to federal tax liens and should not be extended to the somewhat analogous field of federal mortgages. The Court of Appeals also found that there was nothing in Chapter 13 of Title 12 U.S.C. evidencing congressional intent to waive sovereign immunity to permit the local real estate tax liens to have priority over the federal mortgage.

This Court remanded for consideration the crossclaims of Sadie Schwartz and D.C.R. Holding Corp.

The Supreme Court denied certiorari.

The municipalities then moved for summary judgment, dismissing the cross-claims. There were no issues of fact raised — the only questions before the Court were questions of law.

The motion was granted by District Judge Jack B. Weinstein, who held that the cross-claimants in purchasing their tax liens did so with forewarning of the United States mortgage which was a matter of public record. Under these circumstances the cross-claimants could not prevail.

The cross-claimants appeal from the final judgment in favor of the County, Town, Village and School District against the cross-claimants.

## Question Presented

Whether the cross-claimants are entitled to refunds of monies paid for tax lien certificates to the municipal taxing authorities on any theory of law.

The District Court answered in the negative and granted summary judgment in favor of the County, Town, Village and School District.

## POINT I

**The County of Nassau validly assessed the subject property for County taxes and the subject property was not immune from municipal taxation by reason of the mortgage held by the United States so as to entitle cross-claimants to a refund.**

The law is clear that a conveyance of real property by a county treasurer made as the result of a tax sale is subject to all claims of the county or state for taxes, liens or other encumbrances. Real Property Tax Law §1020 (1). *People* v. *Pierce*, 186 Misc. 485, 64 N.Y.S. 2d 251; *Riverhead Estates Civic Assc.* v. *Gobron*, 206 Misc. 405, 134 N.Y.S. 2d 13 (Suffolk Co. 1954).

Real Property Tax Law §1020 (3) provides that every such conveyance as a result of a tax sale constitutes presumptive evidence that the sale and all proceedings thereto, from and including the assessment of the land and all notices required to be given, were regular and in compliance with the law. Appellants do not claim that there are former irregularities so serious as to warrant setting aside a taxable sale. *People ex rel. Boenig* v. *Hegeman*, 220 N.Y. 118. Nor do they claim any defects in the assessment proceedings. It is clear that the assessment is valid and that the procedures followed in the receipt of a tax certificate are not at issue in the case at bar.

Armed with the proposition that the assessment and the tax sale certificate were valid and regular, the next issue that surfaces becomes what, in fact, did the cross-claimants purchase?

It is clear that the purchasers of the tax sale certificates purchased an absolute estate in fee. However, that ultimate title is not free and clear of all liens or claims prior to the levying of the tax for which the certificates had been issued. The cross-claimants clearly take subject to section 1020 (1) of the Real Property Tax Law of the State of New York. The purchaser of a tax sale certificate takes

whatever interest the County may have to convey subject to any and all superior liens of sovereignty, including the United States of America, and other municipalities. *Riverhead Estates Civil Assoc.* v. *Gobron, supra*; *Commissioners of State Insurance Fund* v. *Dinowitz*, 179 Misc. 278, 39 N.Y.S. 2d 34.

It is also clear that a tax sale conveys no greater title than that of the person in whose name the tax was assessed. *Hannah* v. *Babylon Holding Corp.*, 28 N.Y. 2d 89, 320 N.Y.S. 2d 35 (1971).

The conclusions having been reached that (1) the County assessments are valid, and (2) the purchasers' tax sale certificates are taken subject to certain liens or encumbrances of record, to wit, the mortgage lien of the United States of America, it is necessary to proceed to the issue of the validity in the case at bar. The County of Nassau clearly has the power to tax the MacArthur property. In *United States* v. *General Douglas MacArthur Senior Village, Inc.*, 470 F. 2d 675, 680 (2d Cir. 1972) *cert. den. sub.nom., County of Nassau et al* v. *United States*, 412 U.S. 922 (1973), the Court stated at page 679:

> " ... At least since *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 4 L. Ed. 579 (1819), property of the United States has been immune from taxation by the states or their subdivisions, in the absence of Congressional consent. Of course, in the case at hand, the United States *does not own the property, but has* only a mortgage interest. Although in such a case local governments may assess taxes based on the full value of the property, see *S.R.A., Inc.* v *Minnesota*, 327 U.S. 558, 66 S. Ct. 749, 90 L. Ed. 851 (1946) *New Brunswick* v. *United States*, 276 U.S. 547, 48 S. Ct. 371, 72 L. Ed. 693 (1928), taught that local governments cannot take any action to collect unpaid taxes assessed against property which would have the effect of reducing or destroying the value of a federally held purchase-money mortgage lien.

> *Accord, S.R.A., Inc.* v. *Minnesota, supra; United States* v. *Roessling*, 280 F. 2d 933 (5th Cir. 1960). In short, the land is not immune from local taxation, but the federal interest is, and the local governments cannot enforce their liens until the federal debt is satisfied." (Emphasis supplied.)

The Second Circuit Court of Appeals upheld the validity of the County property tax as well as the priority and validity of the first mortgage lien of the United States on the subject property and it was conclusively determined by that Court.

## POINT II

**The purchasers of the County tax sale certificates bought them with full knowledge of the mortgage held by the United States on the subject premises and have no basis in law for a claim against the County of Nassau.**

Claimants contend that since they have purchased a tax certificate from the County of Nassau that cannot be ultimately conveyed into a deed for the subject premises, they therefore are entitled to a refund. Prior to the sale of these tax certificates, United States mortgage loan was a matter of public record, the mortgage having been recorded in the Nassau County Clerk's Office on May 9, 1966. The claimants were truly acquainted with the existence or non-existence of facts surrounding the purchase of the tax sale certificates. In addition, they are also charged with the knowledge of the United States mortgage lien which is a matter of public record and which encumbered the subject premises.

The law is clear that a party who pays money under a mistake of fact, or under a mistake of mixed fact and law, to one who allegedly is not entitled thereto, must in equity and good conscience be permitted to recover it back. The

ground on which the rule has long rested is that money paid through misapprehension of facts belongs in equity and good conscience to the person who paid it. The modern rationale of this rule is the equitable doctrine of unjust enrichment, which cross-claimant, Sadie Schwartz, alludes to at page 13 of her attorney's brief. The County of Nassau contends that this rule does not apply to the case at bar.

The doctrine of unjust enrichment does not apply because the cross-claimants are charged with a mistake of tax law, as well as its attending legal consequences, which bars any recovery. It is also clear there can be no recovery in any field due to ignorance of the law governing a transaction which was entered into even at a time when there was no statute or authoritative court decision in existence upon the point involved. *Mercury Machine Importing Corp.* v. *New York*, 3 N.Y. 2d 418, 165 N.Y.S. 2d 517, 144 N.E. 2d 400; *Whitehall Pharmacal Co.* v. *New York*, 10 Misc. 2d 548, 169 N.Y.S. 2d 543, *rev'd, other grounds*, 16 A.D. 2d 920, 230 N.Y.S. 2d 667.

In common law, the doctrine was settled that in general a mistake of law is not adequate grounds for relief. Where a party, with knowledge of all the material facts, as is evident in the case at bar, and without any other special circumstances giving rise to inequity in his behalf, entered into a transaction affecting his interest, rights and liability, under ignorance or error with respect to the rules of law controlling the case the courts would not in general relieve him of the consequences of his mistake. *New York City Employees' Retirement System* v. *Eliot*, 267 N.Y. 193, 196 N.E. 23; *Adrico Realty Corp.* v. *New York*, 250 N.Y. 29, 164 N.E. 732; *Flynn* v. *Hurd*, 118 N.Y. 19, 22 N.E. 1109; *Martin* v. *McCormick*, 3 N.Y. 331.

This rule of law has been said to be a rule of sound public policy. *Van Hise* v. *Rensselaer County*, 21 Misc. 572, 48 N.Y.S. 874; *People ex rel. Edison Electric Illuminating Co.* v. *Wemple*, 69 Hun. 367, 23 N.Y.S. 661, *rev'd, another ground*, 141 N.Y. 471, 36 N.E. 506.

The law is clear that payment voluntarily made under a mistake of law, but with the full knowledge of the facts, does not entitle a person to recover back taxes paid to a municipality. *Manufacturers' & Traders' Trust Co.* v. *Buffalo*, 266 N.Y. 319, 194 N.E. 2d 841; *Goldberg* v. *New York*, 260 A.D. 61, 20 N.Y.S. 2d 801, *aff'd* 285 N.Y. 705, 34 N.E. 2d 386, and to assessment situations as well. *Adrico Realty Corp.* v. *New York, supra; Pooley* v. *Buffalo*, 122 N.Y. 592, 26 N.E. 16.

While it is now provided by statute, Civil Practice Law and Rules §3005, that relief should not be denied merely because the mistake is one of law rather than one of fact, the language of the statute contains no reference to tax law. It in no manner inhibits the decision against the recovery of illegal taxes paid without protest merely because a taxpayer was mistaken in understanding when he paid his tax. After consideration of the exigencies of public finance, which differ in some respects from private transactions, against the background of the traditional rule that taxes cannot be recovered for a mistake of law in the absence of duress or of protest, it has been decided that this rule continues in effect under the statute. *Mercury Machine Importing Corp.* v. *New York, supra; Whitehall Pharmacal Co.* v. *New York, supra, rev'd, other grounds*, 16 A.D. 2d 920, 230 N.Y.S. 2d 667, *Menendez* v. *Faber, Coe & Gregg, Inc.* 345 F. Supp. 527, 543 (S.D. N.Y. 1972).

The cross-claimants were fully aware and charged with the facts herein. It can only be concluded that their error was a mistake in interpretation of the law and the legal consequences emanating therefrom. The burden of their loss in the purchase of the tax sale certificates falls squarely on their shoulders.

## POINT III

**The cross-claimants are not entitled to a refund where the payments for the purchase are voluntarily made under a claim of right.**

The rule is that the law affords no relief to one who, with the knowledge of the facts, makes a voluntary payment of money to one he does not owe. *Redmond* v. *New York*, 125 N.Y. 632, 26 N.E. 727; *Cox* v. *New York*, 103 N.Y. 519, 9 N.E. 48; *Board of Supervisors* v. *Ellis*, 59 N.Y. 620 (payment by public board acting within scope of its authority). This rule has been applied to payment made in connection with the payment of taxes and assessments. *McCue* v. *Board of Supervisors*, 45 A.D. 406, 61 N.Y.S. 315, *aff'd* 162 N.Y. 235, 56 N.E. 627; *Commercial Bank of Rochester* v. *Rochester*, 42 Barb. 488; *Redmond* v. *New York, supra*, *Tripler* v. *New York*, 125 N.Y. 617, 26 N.E. 721; *Moore* v. *Albany*, 98 N.Y. 396; *St. Stanislaus Church Soc.* v. *Erie County*, 153 Misc. 511, 275 N.Y.S. 84.

In general, payments are presumed to be voluntary until the contrary is shown, (*Whiting* v. *City Bank of Rochester*, 77 N.Y. 363) and the burden rests on the party asking to recover a payment to prove that it was involuntary. This has not been shown here. It is clear that the cross-claimants' purchases of the tax sale certificates were made by voluntary payments where the purchasers had complete freedom of exercising their will, and that in making the payments they had full and complete knowledge of all the facts. Claimants, in purchasing the tax sale certificates, took a speculative and calculated risk as to their ability to have such certificates ripen into a deed within the statutory period of time.

The tax sale purchasers may not recover the money paid for another reason. McQuillin Municipal Corporations, 3rd Edition, Volume 16, at section 44.172 states:

> "In the absence of statute, the rule of caveat emptor applies to the purchaser at a tax sale. Liability for refund of the amount paid by the purchaser of property at a tax sale, where title fails or the property is exempt from taxation, does not exist at common law, and therefore is purely statutory . . ."

It is evident that no statutory authority exists in the case at bar authorizing the County of Nassau to refund to the purchaser any monies paid for the tax sale certificates and to do so might very well be an improper act on the part of the County of Nassau without specific statutory authority. Therefore, it is submitted that reliance on section 1464 (d) (6) of the Real Property Tax Law and Section 5-68.0 of the Nassau County Administrative Code provides no succor nor sustenance for the cross-claimants in this action.

The contentions of the defendant D.C.R. are that it is entitled to a refund of the money paid for tax certificates (1) because the municipality cannot deliver a conveyance or possession of the MacArthur property, Section 1464, Real Property Tax Law, and (2) because of the doctrine of frustration of contract.

With respect to the first argument, D.C.R. would have this Court read into Real Property Tax Law §1464, a provision that if the purchaser of the tax certificate cannot obtain a conveyance or possession of the real property purchased at a tax sale by reason of a superior right in the United States to the real property, and which claim of the United States was a matter of public record at the time of the sale of such tax certificate, then the purchaser may obtain a refund of his purchase price.

No such result is sanctioned by statute nor does D.C.R. cite any authority of any Court for this proposition. The sole basis for a refund is contained in Section 1464 (6) of the Real Property Tax Law and the facts of this case do not come within the parameters of this section.

D.C.R. further argues that it is entitled to a refund on the tax sale certificates by virtue of the theory of frustration of contract. D.C.R. relies upon *W.K. Ewing Co.* v. *New York State Teachers' Retirement System*, 14 A.D. 2d 113, 218 N.Y.S. 2d 253, *aff'd*, 11 N.Y. 2d 749.

It is submitted that D.C.R.'s reliance therein is misplaced. The aforesaid case deals with the principle that non-performance is excused where without the fault of the promissor, performance becomes impossible by the cessation of the existence of a necessary thing or person and not with the doctrine of frustration of contract. 10 N.Y. Jur. Contracts §370. Any fair evaluation of interpretation of the intention of the parties upon the sale of the tax certificates does not indicate that by virtue of the United States foreclosing its first mortgage lien and subsequently purchased by the United States that D.C.R. was to obtain a refund of its monies from the County of Nassau from the purchase of the tax sale certificates. The purchase of the tax sale certificates was with full knowledge of the federal mortgage and was voluntary.

## CONCLUSION

**For the reasons stated above, the judgment of the District Court should be affirmed.**

Respectfully submitted,

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AFFIDAVIT OF SERVICE BY MAIL

State of New York
ss
County of Nassau

Gasper L. Clemente, being duly sworn, deposes and says: That he is President of the Davenport Press, Inc., printers of the attached Brief in the matter of

United States of America vs. Mac Arthur Sr.

That on the 30th day of April, 1974 he served 3 copies of said Brief on

See attached Rider

by depositing same, securely enclosed in a post paid wrapper in a Post Office regularly maintained by the United States government at Mineola, New York, County of Nassau, directed to said attorney(s) at the address listed above, that being the address within the state designated for that purpose upon the preceding papers in this action, or the place where they then kept an office between which places there was and now is a regular communication by mail.

Deponent is over the age of 21 years.

Gasper L. Clemente
Gasper L. Clemente

Sworn to before me this
30th day of April, 1974

Comm... March 30, 197...

RIDER TO AFFIDAVIT OF SERVICE BY MAIL
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